EXHIBIT B

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHARLIE JAVICE, Plaintiff, v. JP MORGAN CHASE BANK, N.A., JPMORGAN CHASE & CO., and TAPD, LLC, Defendants.	:	C.A. No. 2022-1179-KSJM
OLIVIER AMAR, Plaintiff, v. JP MORGAN CHASE BANK, N.A., JPMORGAN CHASE CO., and TAPD, LLC, Defendants.	:	C.A. No. 2023-0040-KSJM

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Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Monday, May 8, 2023
11:00 a.m.

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BEFORE: HON. KATHALEEN ST. J. McCORMICK, Chancellor

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BENCH RULING RE CROSS-MOTIONS FOR SUMMARY JUDGMENT

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware 19801
(302) 255-0521

APPEARANCES: (via telephone)

MICHAEL A. BARLOW, ESQ.
SAMUEL D. CORDLE, ESQ.
PETER C. CIRKA, ESQ.
Abrams & Bayliss LLP
-and-
MAAREN A. SHAH, ESQ.
JAN-PHILIP KERNISAN, ESQ.
of the New York Bar
Quinn Emanuel Urquhart & Sullivan LLP
for Plaintiff Charlie Javice

JACOB KIRKHAM, ESQ.
STEVEN G. KOBRE, ESQ.
Kobre & Kim LLP
for Plaintiff Olivier Amar

PETER J. WALSH, JR., ESQ.
MICHAEL A. PITTENGER, ESQ.
HAYDEN J. DRISCOLL, ESQ.
REECE BARKER, ESQ.
Potter, Anderson & Corroon LLP
for Defendants

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dispute. The subsequent language states: "for which such Indemnitee is not entitled to indemnification or advancement of expenses pursuant to the Organizational Documents of the Company or pursuant to this Section 6.2."

Both sides argue that the contractual language is unambiguous. The Plaintiffs interpret the clause set off by the comma to mean that the carve-out only applies to claims for advancement not already covered by Section 6.2 or Frank's bylaws. The Defendants interpret the clause to mean that Plaintiffs are divested of all advancement rights, regardless of source, for breach-related conduct.

I'll stop to acknowledge that neither Plaintiffs signed the merger agreement in their personal capacity, although Section 6.2(g) identifies indemnitees — which includes Plaintiffs — as third-party beneficiaries of Section 6.2.

The Defendants argue that Plaintiffs are nevertheless personally bound by the contractual waiver because both Plaintiffs are identified as "Knowledged" persons in Section 1.1 of the merger agreement. Under the merger agreement's definition of that term, however, this merely means that the

Plaintiffs' actual knowledge can be imputed to Frank. It would be a stretch, in my view, to say that this term rendered the Plaintiffs parties to the agreement.

Also, it is true, as the Defendants said, that Javice signed the merger agreement on behalf of Frank in her capacity as its CEO. But, again, the fact that Javice was a signatory on behalf of Frank does not render her a party to the agreement in her personal capacity. In fact, the preamble of the merger agreement states that it is entered into only by JPMorgan Bank, its merger subsidiary, and Frank. The preamble does not list Javice as a contracting party. Later, in Section 9.16, the merger agreement defines those parties identified in the preamble as the "Contracting Parties."

Since the Defendants are unable to show that Plaintiffs are personally bound by the merger agreement as parties, Defendants are left to argue that Section 6.2(i) bound Plaintiffs as third-party beneficiaries.

Both sides quote from this court's 2007 decision in *NAMA Holdings, LLC v. Related World Market Center, LLC*. That decision states that a third-party beneficiary cannot "cherry-pick certain

provisions of a contract which it finds advantageous ... while simultaneously discarding corresponding contractual obligations which it finds distasteful." The Defendants argue that the Plaintiffs cannot claim the benefits of the broad advancement rights granted in Section 6.2(a) without acknowledging the limitations on those rights imposed in Section 6.2(i).

The Defendants in my view are partially correct, but only to the extent that the Plaintiffs seek to enforce advancement rights bestowed on them by the merger agreement.

In the words of the *NAMA* decision, "intended third-party beneficiaries may enforce an agreement's provision," but "[m]ere incidental beneficiaries have no legally enforceable rights under a contract." And, quoting another portion of *NAMA*, "A third-party beneficiary is an incidental beneficiary unless the parties to the contract intended to confer a benefit upon it."

The parties do not dispute that Amar or Javice are intended third-party beneficiaries to the merger agreement. So, to the extent they seek to enforce their advancement rights under that agreement, the Plaintiffs cannot cherry-pick which parts apply to

them. If the Plaintiffs rely upon the merger agreement, they opt into that agreement and take the good with the bad.

The Defendants, however, overextend their argument based on the Plaintiffs' status as third-party beneficiaries. They state that the terms of the merger agreement can eliminate the Plaintiffs' rights in other instruments, even though the Plaintiffs did not negotiate those terms in their personal capacity.

But that is not how third-party beneficiary status works, as I understand it. It would be a strange world if two contracting parties, by making someone a third-party beneficiary to their contract, could completely divest that third party of contract rights they possess independently of the new contract. That would not be tenable. It would also be inconsistent with the fundamental tenets of contract law, requiring a meeting of the minds to create contractual obligations.

Here, the Plaintiffs do not seek to enforce their rights under the merger agreement exclusively. Instead, they foremost seek to implicate their rights under Frank's bylaws. So even if Section

6.2(i) operates the way Defendants say it does, that provision cannot eliminate Plaintiffs' advancements rights, which were created outside the merger agreement before the merger agreement was executed.

Although framed in terms of third-party beneficiary rights, part of Defendants' argument also implicates the doctrine of novation. In other words, Defendants effectively state that Plaintiffs' third-party beneficiary status to the merger agreement novates parts of Frank's bylaws that created advancement rights before the merger, re-conditions those rights on Section 6.2(i), and binds the Plaintiffs only to the new Section 6.2(i).

To quote *Aveta Inc. v. Bengoa*, "[a] novation extinguishes a prior contract and replaces it with a new [one]." The court in *Schwartz v. Centennial Insurance Company* iterated the four elements required for novation: "(1) a valid pre-existing obligation; (2) a valid new contract; (3) extinction of the old contract; and (4) the consent of all parties to the novation transaction." As the *Schwartz* court also stated, "[w]hile a novation can be implied from the acts of the parties, it must be clear that a novation is intended."

Defendants do not cite any authority for their view that being a third-party beneficiary to a contract is enough to novate prior agreements. Nor am I aware of any. *NAMA*, for instance, does not support the Defendants' position. That case requires third-party beneficiaries to a contract to accept the contract, but the court did not require third-party beneficiaries to relinquish any and all rights they possessed from a separate agreement with one of the contracting parties. So, even following *NAMA*, parties to an agreement cannot simply waive a third-party beneficiary's separate and independent rights.

So as you can tell, I'm concerned with where Defendants' positions would leave third-party beneficiaries, generally. It has not been disputed that Plaintiffs' liability would be "by reason of the fact" of acts taken in their officer capacities at Frank. Under the Frank bylaws, proceedings related to these actions are subject to advancement, and Plaintiffs' right to advancement accrued when they took those actions.

Defendants' position seems to be that third-party beneficiaries can waive their advancement rights under the Frank bylaws by benefiting from

provisions of an agreement to which they were not parties. But that approach misuses the concept of third-party beneficiary status.

I'm also worried about this argument in light of Section 145(f) of the DGCL. That statute provides that a right to advancement arising under a corporation's bylaw shall not be impaired by an amendment, repeal, or elimination of such bylaws after the occurrence of the act or omission that is the subject of the action for which such advancement is sought. This court has previously interpreted that provision to mean that indemnitees' right to advancement vests as soon as the indemnitee engages in the covered action. I cite to *Marino v. Patriot Rail Company* as one example.

Defendants argue that Section 145(f) is inapplicable because Frank's bylaws were not amended. But Section 6.2(i), as they argue it, had the same effect. I'll note that it's a separate question as to whether a covered person could agree to waive rights provided to them under a bylaw through private ordering. I don't think the third-party beneficiary status argument gets the Defendants there, but I think there might be a more viable argument to

that effect. So let me turn to the Defendants' next argument.

The Defendants argue that the Plaintiffs' execution of the resignation letters rendered them personally bound to the merger agreement because the letters referenced Section 6.2 of the merger agreement.

In my view this argument fails not categorically -- it's not as if the parties could not have done this through a resignation letter -- but, rather, based on the plain language of the resignation letter.

As with Section 6.2(i), the placement of a comma in the resignation letter divides the parties' positions. The resignation letter contains a broad release of claims against Defendants "from any and all claims as a director or officer of the Company Group that I have in such capacity as a director or officer (or any comparable position) as of the Closing."

Preceding this clause is a carve-out list of claims excepted from this provision, including "accrued and unpaid compensation, expense reimbursements, accrued and owing benefits and rights

CERTIFICATE

I, JEANNE CAHILL, RDR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 32 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 9th day of May, 2023.

/s/ Jeanne Cahill

Jeanne Cahill, RDR, CRR
Official Chancery Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter